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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-237

Supreme Court U. S.
FILED
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MICHAEL RODAK, JR., CLERK

VINCENT R. MANCUSI, Superintendent of Attica Correctional Facility,

Petitioner,

against

WILLIAM C. STUBBS,

Respondent.

BRIEF FOR RESPONDENT AND APPENDICES

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IN THE

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OCTOBER TERM; 1971

No. 71-237

VINCENT R. MANCUSI, Superintendent of Attica Correctional Facility,[1]

Petitioner,

against.

WILLIAM C. STUBBS,

Respondent.

STATEMENT OF CASE

An earlier Tennessee conviction was used by the State of New York to give the respondent William C. Stubbs increased punishment following a New York conviction. After exhausting his state remedies[2] Mr. Stubbs applied for *habeas corpus* relief to the United States District Court for the Western District of New York. In *United States* ex rel. *Stubbs* v. *Mancusi*, 442 F. 2d 561, the Court of Appeals for the Second Circuit reversed, with one judge dissenting, the decision denying relief.

[1] When this proceeding was begun, Vincent R. Mancusi was the Warden of Attica Prison. As such he had custody of the respondent Stubbs. Later the name of the institution was changed to "Attica Correctional Facility" and the title "warden" to "superintendent". The present superintendent is Ernest L. Montanye.

[2] See the decision of the United States District Court for the Western District of New York, dated June 30, 1969; ¶5 (printed as Appendix D, p. 14a, to petition for certiorari).

The court below held that the Tennessee conviction had been obtained in violation of the respondent's right to confrontation. At the Tennessee trial the prosecution's primary witness did not appear, but earlier testimony of his was read into evidence. No effort had been made by the prosecutorial authorities in Tennessee to obtain this witness' attendance at the trial. It was shown only that the witness had moved to Sweden.

ARGUMENT

POINT I

THE RESPONDENT WAS DEPRIVED OF HIS RIGHT TO BE CONFRONTED WITH THE WITNESSES AGAINST HIM BY THE READING AT HIS TENNESSEE TRIAL OF THE PREVIOUS TESTIMONY OF A WITNESS WHO WAS RESIDING IN SWEDEN AND WHOSE PRESENCE AT TRIAL THE PROSECUTION HAD MADE NO EFFORT TO OBTAIN.

This Court has steadfastly held that the Sixth Amendment right of an accused to confrontation applies to the States through the force of the Fourteenth Amendment.[3] *Pointer* v. *Texas*, 380 U. S. 400, 403; *Douglas* v. *Alabama*, 380 U. S. 415, 418; *Brookhart* v. *Janis*, 384 U. S. 1, 4; *Barber* v. *Page*, 390 U. S. 719, 721; *Bruton* v. *United States*, 391 U. S. 123, 126; *Illinois* v. *Allen*, 397 U. S. 337, 338; *California* v. *Green*, 399 U. S. 149, 150-151; *Dutton v. Evans*,

[3] The Sixth Amendment to the United States Constitution provides (in part): "In all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . and to have the Assistance of Counsel for his defence." The Fourteenth Amendment provides (in part): ". . . nor shall any State deprive any person of life, liberty or property, without due process of law . . ."

400 U. S. 74, 79; *Nelson* v. *O'Neil*, 402 U. S. 662, 665, 29 L. Ed. 2d 222, 226.[4]

Pointer v. *Texas*, 380 U. S. 400, involved use at trial of the testimony of a robbery victim. It had been recorded at a preliminary hearing at which the defendant was without counsel and did not try to cross examine the victim. The Court held that the right of confrontation guaranteed by the Sixth Amendment and carried into state criminal cases by the Fourteenth Amendment was denied Mr. Pointer: "There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal" (380 U. S. 400, 405).

In *Barber* v. *Page*, 390 U. S. 719, this Court held that Oklahoma could not use the preliminary hearing transcript of the testimony of a witness, who at the time of trial was incarcerated in a federal prison 225 miles away in Texas.

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[4] The argument is made in the brief of the District Attorney of Monroe County, *Amicus Curiae*, that *Pointer* v. *Texas*, 380 U. S. 400 should be overruled, as improperly imposing a federal hearsay rule on the States. This is not what the Court held in *Pointer* (see 380 U. S. 400, 407 and *Dutton* v. *Evans*, 400 U. S. 74, 80, 105, footnote 7). But even if, as it is argued, "[t]he answer to the problem we feel is to apply the Fourteenth Amendment's 'due process' test without specific reference to the Sixth Amendment" (*Amicus Curiae* brief, pp. 4-5), reverting to such a rule would not affect the outcome of the present case. As will be shown, the present case is not significantly different from *Pointer* v. *Texas*, 380 U. S. 400, or *Barber* v. *Page*, 390 U. S. 719. In those cases the late Mr. Justice Harlan, who forcefully argued against the so-called "incorporation" doctrine (and for the position apparently favored by the *Amicus Curiae*), nevertheless, concurred in the results, holding that the petitioner in *Pointer* was deprived "of a right of 'confrontation' assured by the Fourteenth Amendment" (380 U. S. 400, 408) and that the State's failure to attempt to obtain the presence of the witness involved in *Barber* denied due process (390 U. S. 719, 726).

The accused Barber and the witness had originally been co-defendants represented by the same attorney. At the preliminary hearing the witness waived his privilege against self-incrimination. The attorney then withdrew as to him but continued to represent Mr. Barber. This attorney did not cross examine the witness at the preliminary hearing. The State argued in *Barber* that the introduction of the transcript was proper since the witness was outside the jurisdiction and therefore unavailable at the time of trial, and that the right of cross examination was afforded the petitioner Barber at the preliminary hearing although not utilized then by him. For the purpose of decision it was assumed: "that petitioner made a valid waiver of his right to cross-examine Woods at the preliminary hearing, although such an assumption seems open to considerable question under the circumstances. [Footnote omitted.] We start with the fact that the State made absolutely no effort to obtain the presence of Woods at trial other than to ascertain that he was in a federal prison outside Oklahoma" (390 U. S. 719, 722-723).

The Court noted that with respect to a prospective witness currently in federal custody, 28 U. S. C. § 2241 (c) (5) gives federal courts the power to issue writs of *habeas corpus ad testificandum* at the request of state prosecutorial authorities and that the federal Bureau of Prisons permitted inmates of federal prisons to testify in state court criminal proceedings pursuant to writs of *habeas corpus ad testificandum* issued out of state courts. The court held: "In this case the state authorities made no effort to avail themselves of either of the above alternative means of seeking to secure Woods' presence at petitioner's trial. The Court of Appeals majority appears to have reasoned that because the State would have had to request an exercise of discretion on the part of federal

authorities, it was under no obligation to make any such request. Yet as Judge Aldrich, sitting by designation, pointed out in dissent below, 'the possibility of a refusal is not the equivalent of asking and receiving a rebuff.' 381 F. 2d, at 481. In short, a witness is not 'unavailable' for purposes of the foregoing exception to the confrontation requirement unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial. The State made no such effort here, and, so far as this record reveals, the sole reason why Woods was not present to testify in person was because the State did not attempt to seek his presence. The right of confrontation may not be dispensed with so lightly." (390 U. S. 719, 724-725).

Barber v. *Page*, 390 U. S. 719, has been given fully retroactive application. See *Berger* v. *California*, 393 U. S. 314, in which the Court noted that some effort, although ineffective, had been made on the part of the prosecution to contact as a prospective witness the victim of the alleged robbery and kidnapping; he was in Colorado at the time of the accused's California trial.

In the present case the only prosecution eye-witness to the homicide was a Mr. Alex Holm.[5] We can start, as did the Court in *Barber* v. *Page*, with the fact that the State of Tennessee made absolutely no effort to obtain the presence of Mr. Holm at trial. It only saw fit to ascertain that he was residing in Sweden. This was established by means of the testimony of Mr. Holm's son, summarized

[5] The witness' name is frequently spelled "Holmes" in the transcript of the 1964 Tennessee trial. The testimony of the witness Holm, as originally given at the 1954 Tennessee trial and read at the 1964 trial by the original court reporter, is reproduced in full in the joint appendix (A. 36-74 on rebuttal, A. 103-105). The respondent William Charles Stubbs' testimony, as defendant in the 1964 Tennessee trial, is reproduced in full in the joint appendix (A. 75-102). The testimony of the other witnesses at the 1964 trial is summarized in appendix A to this brief, p. 1a, *et seq.* The harmful effect of Mr. Holm's testimony is discussed in detail under Point II, parts A and D, below.

below at pp. 4a-5a and by a return made on a subpoena by a Texas sheriff, which had been sent down by the prosecution for a deliberately futile attempt at service in the County of Mr. Holm's former residence (see the summary at p. 11a, below). But this is as far as the prosecution went.

There is an uncontradicted assertion by one of Mr. Stubbs' 1964 counsel that the prosecuting attorney had stated that he would have Mr. Holm present (p. 17a, below) and that Mr. Holm's son had stated outside of the courtroom that his father did not even know the case was being tried (p. 17a, below).

The prosecution should have offered Mr. Holm his traveling expenses and asked him if he was willing to attend the 1964 trial voluntarily. The respondent Stubbs' right to be confronted with the witnesses against him required no less.

The petitioner argues that requirement of a good-faith effort to obtain the presence of the witness should be excused because Mr. Holm was residing more than 4,000 miles from the place of trial and because of "the witness' immunity from any form of process, intra or interstate."[6] In this era of convenient jet travel mere distance is no deterent. The petitioner apparently does not question the application of the decision in *Barber* v. *Page*, 390 U. S. 719 *within* the United States. But Honolulu, Hawaii is about the same distance from Blountville as is Sweden.[7]

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[6] Petitioner's brief, p. 12. The trial was held in Blountville, Tennessee, (appendix A, p. 1a, below), which is near Bristol, Tennessee (see the testimony of Captain Frank Williamson, summarized at pp. 2a-3a, below). Bristol is about 4,689 miles from Stockholm, Sweden. *Standard Highway Mileage Guide*, Rand McNally, 1966, p. 46 column 2; *The New York Times, Encyclopedic Almanac*, 1971, pp. 662, 664-5.

[7] Using the tables referred to in the preceding footnote, it is about 4,542 miles from Honolulu.

Distance was no factor. The prosecution summoned Mr. Holm's son more than 1280 miles from his residence in Texas, and only to testify that his father was living in Sweden![8] A further indication of the hollowness of the prosecution's efforts to secure Mr. Holm's presence is the sending of a subpoena for him down to Texas, when it was quite apparent he no longer lived there (T. 118-119; appendix A. p. 11a, below).

Process, moreover, may have been available in 1964 to compel Mr. Holm's attendance at trial. A broad construction has been given to 28 U. S. C. § 2241 empowering federal courts to issue writs of *habeas corpus ad testificandum* to compel a prisoner's attendance at a state trial, even though the statute does not expressly mention state courts[9] *Barber* v. *Page*, 390 U. S. 719, 724. A similar construction could have attached to 28 U. S. C. § 1783 which provided at the time of the respondent's 1964 trial (in part): "(a) A court of the United States may subpoena, for appearance before it, a citizen or a resident of the United States who: . . . (2) is beyond the jurisdiction of the United States and whose testimony in a criminal proceeding is desired by the Attorney General . . ."* The statute did not say that the criminal proceeding had to be pending in a federal Court. The statute did not purport to limit the power of the Attorney General to "desire", if he chose, that the witness be subpoenaed to a nearby federal court for later appearance in a state criminal proceeding. Compare the policy of the United States Bureau of Prisons to honor writs of *habeas corpus ad testificandum*

[8] See T. 58, *et seq.*, summarized at pp. 4a-5a, below, and *Standard Highway Mileage Guide*, Rand McNally, 1966, p. 46 column 4.

[9] The pertinent provision of 28 U. S. C. § 2241 reads in part: "(c) The writ of habeas corpus shall not extend to a prisoner unless . . . (5) It is necessary to bring him into court to testify or for trial."

* See 1948, Pub. L. 646; 62 Stat. 949.

issued out of state courts. *Barber* v. *Page*, 390 U. S. 719, 724. Following the respondent's trial Congress amended 28 U. S. C. § 1783, so that now, "A court of the United States may order the issuance of a subpoena requiring the appearance as a witness before it, or before a person or body designated by it, of a national or resident of the United States who is in a foreign country, . . ." (October 3, 1964, Pub. L. 88-619, § 10(a), 78 Stat. 997). Mr. Holm was a naturalized citizen of the United States (A. 40; T. 178) and, thus, was amenable to this process.

Even assuming that the present case contained no issue as to the effectiveness of the cross examination of Mr. Holm at his first Tennessee trial, the respondent Stubbs was still deprived of his right to be confronted with the witnesses against him. *Barber* v. *Page*, 390 U. S. 719, 722; *Dutton* v. *Evans*, 400 U. S. 74, 85. The judgment of the court below should be affirmed.

POINT II

THE ADMISSION INTO EVIDENCE OF THE PRIOR RECORDED TESTIMONY WAS HARMFUL ERROR; THE RESPONDENT HAD BEEN DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL IN THE CROSS EXAMINATION OF THE WITNESS AT THE FIRST TRIAL.

A. *Harmless error issue, in general.*

It is absolutely impossible to imagine that the respondent William C. Stubbs would ever have been convicted without the accusations and testimony of Mr. Holm. The other witnesses testified only about the procedures following Mr. Stubbs's arrest, the medical attention given to Mr. Stubbs and to Mr. Holm, the procedures of trial, the exculpatory statements of the defendant, the identification at the hospital of Mr. Stubbs as being the man who shot Mr. Holm

and his wife (see summary of the testimony, appendix A, pp. 1a-19a, below). It is quite clear that if reading the prior testimony of Mr. Holm was—without going into the effectivenses of cross-examination—error, it was critical and harmful error.

B. *Binding effect of Stubbs* v. *Bomar.*

Mr. Stubbs was arrested on the day of the homicide, June 11, 1954; he was assigned three attorneys on July 8, 1954; he was arraigned on July 9, 1954; and he went to trial on the capital charge on July 12, 1954.

In *Stubbs* v. *Bomar,* (U. S. D. C. . M. D. Tenn.; January 6, 1964)[10] Hon. William E. Miller, District Judge, declared null and void the respondent's 1954 Tennessee judgment of conviction: "The Court is of the opinion that the evidence and the record show that the Constitutional rights of petitioner Stubbs were violated at the time of his trial in the Criminal Court of Sullivan County in that his Court-appointed counsel did not have adequate and sufficient time within which to prepare the necessary defense prior to going to trial, and as a result the petitioner was denied effective representation by counsel" (p. 22a, below).

The court below said: "Judge Miller's decision, however, even though it were binding on New York, would not establish the ineffective cross-examination of Holm, but only the prejudice to the totality of defense preparation from late appointment of counsel." *United States* ex rel. *Stubbs* v. *Mancusi,* 442 F. 2d 561, 564 (A. 23, 28). Nevertheless, it may well be that the State of New York is bound by the decision in *Stubbs* v. *Bomar* and that the decision makes unnecessary meticulous examination of the record to demon-

[10] Reproduced as appendix B, below, pp. 20a-23a.

strate the ineffectiveness of the cross-examination of Mr. Holm.

The petitioner cites *Chambers* v. *Maroney*, 399 U. S. 42, which held, ". . . we are not disposed to fashion a *per se* rule requiring reversal of every conviction following tardy appointment of counsel or to hold that, whenever a habeas corpus petition alleges a belated appointment, an evidentiary hearing must be held to determine whether the defendant has been denied his constitutional right to counsel" (399 U. S. 42, 54). The petitioner apparently attacks the decision made by Judge Miller in *Stubbs* v. *Bomar* in 1964.[11] It does not appear that *Stubbs* v. *Bomar* was ever appealed from or questioned by the Tennessee prosecutorial authorities, who, following the decision, promptly awarded the respondent Stubbs a new trial. It ill behooves the State of New York now to challenge for the first time this decision, especially when the State of New York is relying for its increased punishment upon the respondent's conviction at the second Tennessee trial. This conviction would never have come into existence without *Stubbs* v. *Bomar*; it is a carefully considered decision, undoubtedly quite correct, and certainly proof against such an unseemly and belated attack.

The respondent Stubbs was deprived of the effective assistance of counsel at the 1954 trial. This conclusion cannot be avoided by taking the record to pieces.

The use of the rule of collateral estoppel in criminal cases has been clarified by *Ashe* v. *Swenson*, 397 U. S. 436: "'Collateral estoppel' is an awkward phrase, but it stands for an extremely important principle in our adversary system of justice. It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between

[11] Petitioner's brief, p. 17.

the same parties in any future lawsuit" (397 U. S. 436, 443-445).

Since it is established that the representation by counsel in 1954 was ineffective as a whole, it is sinking to hypertechnical niceties to argue that the cross examination of the only eyewitness was an island of effectiveness in a sea of ineffectiveness. Clearly, the respondent Stubs' 1954 counsel had nothing to prepare for, except the cross examination of Mr. Holm, and except the decision whether to call Mr. Stubbs to the stand or not. There was nothing much to do during the other parts of the trial except to sit and listen. "The federal decisions have made clear that the rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality." *Ashe v. Swenson*, 397 U. S. 436, 444. Realistically and rationally approached, the ineffectiveness caused by tardy appointment of counsel in 1954 must have diminished seriously the effectiveness of the cross examination of Mr. Holm. The State of New York, which is in privity with the State of Tennessee, is collaterally estopped from claiming that the 1954 cross examination was effective.

C. *Inquiry to be made in determining whether error harmful.*

Before discussing the evidence in detail it is important to consider what factors determine whether error is harmful. The petitioner states without support that the court below adopted reasoning which "suggests an analogy to the rule that evidence is insufficient unless all reasonable hypotheses except guilt are excluded".[12] This served as an introduction to a string of cases having nothing to do with harmless error, dealing instead with what constitutes suffi-

[12] Petitioner's brief, p. 15.

cient evidence to convict under various federal criminal statutes.[12]

The distinction between a harmless error issue and a sufficiency of evidence issue is strongly drawn in *Glasser* v. *United States*, 315 U. S. 60, which held as to sufficiency of evidence: "It is not for us to weigh the evidence or to determine the credibility of witnesses. The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it." (315 U. S. 60, 80); but which also held: "To determine the precise degree of prejudice sustained by Glasser as a result of the court's appointment of [his attorney as counsel for a codefendant] is at once difficult and unnecessary. The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial" (315 U. S. 60, 75-76).

The court below was fully in accord with this Court's decisions on the harmless error rule. See *Chapman* v. *California*, 386 U. S. 18, in which it was held: "There is little, if any, difference between our statement in *Fahy* v. *Connecticut* [375 U. S. 85, 86-87] about 'whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction' and requiring the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. We, therefore, do no more than adhere to the meaning of our *Fahy* case when we hold, as we now do, that before a federal constitutional error can be held harmless, the court must be able to declare a

[12] "The only one of the cases cited, which even peripherally deals with harmless error, is *Bailey* v. *United States*, 410 F. 2d 1209, 1217 (10th Cir.) cert. den. 396 U. S. 933.

belief that if was harmless beyond a reasonable doubt" (386 U. S. 18, 24).

The test, then, in determining whether the 1954 cross examination of the witness Holm was ineffective is not whether the 1964 conviction was supported by sufficient evidence. This is not an issue. The question was concluded against the respondent on his direct appeal to the Tennessee Supreme Court. *Stubbs* v. *State*, 216 Tenn. 567, 573; 393 S. W. 2d 150, 152.

It is for the *jurors* solely upon the basis of proper evidence, to decide the issue of guilt. In a much-quoted passage written by Judge Fuld for the New York Court of Appeals in *People* v. *Donovan*, 13 N Y 2d 148, 243 N. Y. S. 2d 841, 193 N. E. 2d 628, it was eloquently said: "It cannot be overemphasized that our legal system is concerned as much with the integrity of the judicial process as with the issue of guilt or innocence. The constitutional and statutory safeguards provided for one accused of crime are to be applied in all cases. The worst criminal, the most culpable individual, is as much entitled to the benefit of a rule of law as the most blameless member of society. To disregard violation of the rule because there is proof in the record to persuade us of a defendant's guilt would but lead to erosion of the rule and endanger the rights of even those who are innocent" (13 N Y 2d 148, 153-154).

D. *Cross examination of Mr. Holm as inadequate.*

Mr. Holm testified on direct examination[14] that while he and his wife were at a roadside picnic area, near Cherokee

[14] As read at the 1964 trial Mr. Holm's direct examination consumed 33 pages of the transcript (A. 36-61; T. 174-207); cross consumed 10 pages (A. 61-67; T. 207-217); redirect, 17 pages (A. 67-72; T. 217-234), to which there was no cross examination. There also were three pages of direct rebuttal (A. 103-105; T. 284-287) to which there were three questions asked on recross examination (A. 105; T. 287).

Lake in Tennessee they were approached by the defendant William C. Stubbs (A. 43). A brief conversation took place, and then the defendant walked away (A. 43). When Mr. and Mrs. Holm were just about to leave, the defendant Stubbs came back with a gun in his hand (A. 43). Mr. Stubbs said: "This is the way I am going to catch my ride to Bristol and I am going to do the driving" (A. 44). He threatened to kill both Mr. and Mrs. Holm if they did not get in the car (A. 44). Mr. and Mrs. Holm got in the back seat, with Mr. Holm to the far right (A. 45). Mr. Stubbs drove the automobile, steering with his right hand and holding the gun with his left (A. 45).

They drove through several Tennessee towns (A. 46-47). All of a sudden, according to Mr. Holm: "Well, he was driving along, but he was just looking first one place and then another and looking at his rear mirror. When we got to that place he started shooting" (A. 49). "Q. When he shot, did he say anything, Mr. Holm? A. No, he didn't say a word. Q. Where did he hit you? A. In my face" (A. 50). "When he started shooting, I jumped up and grabbed the gun. . . ." (A. 52). "Q. How long did it take you to get that pistol away from him? A. It didn't take no time. When I jumped on him and jerked that pistol away there was a shot went up" (A. 53).

The car was still moving. "Well, he was trying to get out, but, of course, the combination of the lock, he tried to get that lever down, he tried that three or four times. Finally he found out it went out. Then he stepped on that brake on the car and slid out backwards. Q. What happened to the car? A. I got hold of the steering wheel and kind of whirled it around so it didn't hit the embankment, because it was coming right nearly across the road" (A. 55). "Q. How long after that was it until any person stopped?

A. There was people right there it looked like. It didn't take—I don't think it took half a minute" (A. 59).

The defense offered by Mr. Stubbs, who testified at both trials (A. 75; Appendix A, p. 11a, below), was that while he originally forced himself on the Holms from desperation and hunger (A. 78, 80, 81)[15] he gained their sympathy during the course of the trip and in effect became their guest (A. 82-83). In response to a request from Mrs. Holm, Mr. Stubbs put the gun down on the seat beside him (A. 83). They passed a police officer, with no outcry from the Holms (A. 84). Mr. Stubbs began to relax (A. 84). Then, as they passed a crowd of people (A. 99): "It seems awful strange, but everything just seemed to be awful still and I remember a tree and it just seemed to come up just like that in clear focus, but in a reddish haze. I mean there was no pain or nothing. . . . I felt a sharp pain that seemed to start in my head and go all the way down through me and I reached up with both hands and I heard this loud roar, bang" (A. 85). Bleeding, Mr. Stubbs escaped from the car (A. 85).

• • •

The 1964 trial jury was instructed to acquit if it believed the theory of the defense or had a reasonable doubt of Mr. Stubbs' guilt (p. 19a, below). Mr. Stubbs' version of what happened is by no means incredible. On the other hand, parts of Mr. Holm's version are mighty hard to swallow.

The trip began at a secluded roadside picnic area and extended over more than 50 miles of highway. If (as Mr. Holm said) Mr. Stubbs started shooting without any provocation by the Holms, why did Mr. Stubbs choose to do this

[15] ". . . and I thought that there wouldn't be much wrong with getting a ride if I didn't bother them or take anything that they had or nothing" (A. 81).

where there is a crowd of people nearby, while the car is moving, and after he has begun to relax? Yet, if Mr. Holm had been waiting for a chance to try to seize the gun and struggle with Mr. Stubbs, these are the exact circumstances he would have been looking for.

Mr. Holm managed to get control of the gun, he said: by just reaching for it and jerking it away—after he had been shot twice in the face by Mr. Stubbs. It seems far more likely that Mr. Holm got control of the gun by pouncing on it while his faculties were intact and when Mr. Stubbs could be taken unawares.

Holm's testimony cries out for vigorous cross examination. A cross-examiner is fortunate to have a lying witness trip up on some minor details in his direct testimony (such a witness has usually rehearsed himself on the main parts of his story). Here we have a witness offering unlikely testimony about the very heart of the case. What prepared counsel might have done on cross examination!

Instead, we have eight pages of aimless rehashing of the witness' testimony on direct examination on the route taken (A. 61-66; T. 207-215). Not one question, not one, was asked about the struggle and shooting. Not one question was asked on behalf of the defendant about the development of real or apparent friendly relations.

When in rebuttal on direct examination the witness was led to say that there never were any friendly relations between the Holms and Mr. Stubbs (A. 104), we get a feeble attempt at impeaching that came to nothing and appears to have been abandoned by counsel (A. 105). The impression given by the portion of the 1954 trial revealed at the 1964 trial is that of woefully unprepared defense counsel, particularly shown in the halting and ineffective cross examination of Mr. Alex Holm.

Defense counsel or in 1964 were prepared to do the thing right. See particularly the proposed questions for a cross-examination Nos. 6, 7, 9, 10, 11 12 (A. 73-74).

When the testimony of Mr. Holm was read at the 1964 trial, the respondent Stubbs lost the opportunity of compelling Mr. Holm to stand face to face with the jury in order that they might look at him and judge by his demeanor upon the stand and the manner in which he gave his testimony whether he was worthy of belief. *Mattox* v. *United States*, 156 U. S. 237, 242. Because of the unpreparedness of his 1954 counsel, the respondent has effectively been deprived of his right to cross examine Mr. Holm: "It cannot seriously be doubted at this late date that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him. And probably no one, certainly no one experienced in the trial of lawsuits, would deny the value of cross-examination in exposing falsehood and bringing out the truth in the trial of a criminal case. See, *e. g.* 5 Wigmore, Evidence § 1367 (3d ed. 1940). The fact that this right appears in the Sixth Amendment of our Bill of Rights reflects the belief of the Framers of those liberties and safeguards that confrontation was a fundamental right essential to a fair trial in a criminal prosecution." *Pointer* v. *Texas*, 380 U. S. 400, 404. At the time the Sixth Amendment was adopted, moreover, mere absence from a jurisdiction justified no exception to the common law right of confrontation.[16] The 1964 Tennessee conviction of the respondent should not survive.

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[16] The exceptions were (1) death of the witness or (2) absence because of the defendant's connivance. *Regina* v. *Scaife* (1851) 17 Q. B. 238; 242, 244; 2 Den. C. C. 281, 285-286; 5 Cox C. C. 243, 245, 246; *Motes* v. *United States* (1900) 178 U. S. 458, 471-473; *Wilbur* v. *Seldon* (1826, N. Y. Sup. Ct.) 6 Cowen 165; *LeBaron* v. *Crombie* (1817) 14 Mass. 234, 235.

CONCLUSION.

The Tennessee prosecutorial authorities failed to make any good faith effort to obtain the presence at trial of the prosecution's indispensible witness, a citizen of the United States residing in Sweden. The reading of the recorded testimony of this witness deprived the respondent of his right of confrontation. The failure of the State to try to get the witness to come to the trial voluntarily is not excused by the distance to his new residence nor by the fact that it is in a foreign country. A means may have existed to have compelled the witness' attendance.

The testimony read was highly damaging to the defense. The introduction of it was harmful error. The testimony was recorded when the respondent was being deprived of the effective assistance of counsel. The State of New York is bound by the Tennessee federal district court's adjudication of this and is estopped from contending that counsel had effectively cross examined the witness. Review of the cross examination of this witness shows that it clearly was ineffective.

The State of New York should not have used the Tennessee conviction as a predicate for increased punishment of the respondent. The judgment of the court below, granting *habeas corpus* relief, should be affirmed.

Respectfully submitted,

WILLIAM C. STUBBS,
Respondent,

By his attorney,
BRUCE K. CARPENTER.

Dunkirk, New York,
March 31, 1972.

APPENDIX A

Tabular Summary of Testimony at Respondent's Second Tennessee Trial

Okley Feathers.

The respondent's Tennessee conviction in 1954 was declared null and void in Federal *habeas corpus* proceedings by an order of Hon. William E. Miller, Judge of the United States District Court for the Middle District of Tennessee, entered on January 6, 1964 (this decision is reproduced as Appendix B, below). The respondent's second Tennessee trial began on July 20, 1964. A certified copy of the transcript of the 1964 trial has been filed with this Court. Since the testimony of only two of the witnesses at the 1964 trial is reproduced in the joint appendix (pp. A.36-105), a brief summary of the other witnesses' testimony follows:

Okley Feathers (T. 2-20; 153-158)* was the deputy Court Clerk who had custody of the records relating to the prosecution of William Charles Stubbs (T. 2). It was proved by the minutes of the July term, 1954, that the jury had found the defendant William C. Stubbs guilty of murder in the first degree, felonious assault with intent to commit murder in the first degree (for which he was sentenced to concurrent terms of imprisonment of ninety-nine years and three to twenty-one years) and guilty of kidnapping in two cases (for which he had been given concurrent sentences of two to ten years), but the kidnapping

* The numbers in parentheses preceded by "T." refer to the pages of the 1964 trial of the respondent in the Criminal Court, Blountville, Sullivan County, Tennessee. This transcript as prepared for the Tennessee Supreme Court, was denominated "bill of exceptions", and was filed with the Tennessee Supreme Court on March 23, 1965. References to pages of the printed appendix in this Court will be preceded by "A.".

Tabular Summary of Testimony at Respondent's Second Tennessee Trial.

Okley Feathers; Frank Williamson.

sentences were to run consecutively with the murder and assault sentences (T. 6). The prosecution introduced a copy of the order from the United States District Court of the Middle District of Tennessee, civil action No. 3585 before Hon. William E. Miller (T. 19; 153-158; see Appendix B, below).

FRANK WILLIAMSON (T. 21-38) was a captain with the highway patrol and was commanding officer of the division including Sullivan County, Tennessee, on July 11, 1954 (T. 21). The highway patrol investigated a wreck near Blountville and then began to look for an individual on foot (T. 22-23). At dusk a roadblock was set up (T. 23). It was at the hospital that the witness first saw the defendant Stubbs, who had a shot wound in his head and a powder burn on his left hand (T. 23-24). Mr. Stubbs was observed to be left-handed (T. 24). The defendant was questioned at the police station in Bristol, Tennessee: "I asked him about the gun and he said, I have no gun. I asked him where he had been and he stated that he had been in and around Cherokee Lake. He had been fishing. I asked him where he got that head wound and he said that he fell on some rocks while fishing. I asked him about his hand and as I remember, he didn't make any statement about his hand" (T. 26). The defendant denied having a gun at the time (T. 28).

The defendant Stubbs was taken in a patrol car to the hospital, handcuffed to one of the officers (T. 28-29). He was taken to the room of a Mr. Holm (T. 29):* "Well, he

* The spelling given for "Holm" in the transcript was at times "Holmes".

Tabular Summary of Testimony at Respondent's Second Tennessee Trial.

Frank Williamson; Jim Pendergrass.

[Mr. Holm] had been shot in the head and we asked him a question of Mr. Stubbs who was there, who shot him and he said, that boy there . . . . . He said, that is the man that shot me and killed my wife" (T. 29, 30).

The witness had measured the distance traveled by Mr. Stubbs in the company of Mr. and Mrs. Holm; it was approximately 52 to 55 miles (T. 31). On cross examination Captain Williamson testified that during the conversations by the police with the defendant there was always a number of uniformed and armed police officers present (T. 32-33). The route taken by Mr. Stubbs and the Holms led through Rogersville, a sizeable town, through Churchill, through the center of Kingsport, through Center Street, Blountville, to a place a couple of miles east of Blountville (T. 34-35). Mr. Stubbs had wounds on the top of his head, which were called to the attention of the police officers by a doctor at the hospital (T. 36).

JIM PENDERGRASS (T. 39-57) was an officer with the highway patrol (T. 39). He received a radio call and went to a place on the highway a mile or a mile and a half east of Blountville (T. 40). He found a black 1951 Ford with Texas license plates (T. 40). He found in the car an old model .32 Smith and Wesson pistol on the back floorboard of the car behind the front seat (T. 41). The gun had six empty shells in it and had blood on it (T. 41). There was blood all over the interior of the car (T. 42). When Mr. Pendergrass arrived Mr. Holm was there injured, but Mrs. Holm, the deceased, was not there (T. 43). A search, which was to last approximately six hours, began (T. 43).

Tabular Summary of Testimony at Respondent's Second Tennessee Trial.

Jim Pendergrass; Burl Q. Holmes.

It was approximately 2:00 o'clock in the afternoon when the witness arrived at the scene (T. 44). The witness first saw the defendant Stubbs at the police station in Bristol that night (T. 44). The defendant was about five and one-half feet tall and weighed about one hundred forty or one hundred fifty pounds (T. 44). Mr. Pendergrass did not hear the defendant Stubbs make any statements that night (T. 44). The defendant had on a brown shirt which was bloody all over (T. 44). The defendant had about a two or three days' growth of beard (T. 44, 45). The next day the witness had a conversation with the defendant Stubbs (T. 45). The defendant said he had been hitch-hiking from Texas up through North Carolina to Bristol (T. 46).

On cross examination Mr. Pendergrass testified that when he got to the 1951 Ford with the Texas license nobody was in it (T. 50). The car was a two-door model (T. 51). The gun was lying in open view on the floor of the rear seat, directly behind the driver's seat (T. 51). Blood was found on both the floor and the back seat (T. 52). The witness did not hear any of the police officers ever advise Mr. Stubbs of his right against self-incrimination (T. 53). The witness recalled that there were blood spots on the front of Mr. Stubbs' shirt, but could not recall any blood on the back (T. 54). The witness remembered that there was at least one deep gash on the defendant Stubbs' head (T. 56).

Burl Q. Holmes (Holm) (T. 58-63) was the son of the deceased Mrs. Ruby Holm and of Mr. Alex Holm (T. 58). Burl Q. Holmes lived in George West, Texas, about 80 miles southwest of San Antonio (T. 58). The witness' father, Mr. Alex Holm, was living at the time of the 1964

Tabular Summary of Testimony at Respondent's Second Tennessee Trial.

Burl Q. Holmes; Bernie Webb.

Tennessee trial in Ekskogen, Sweden (T. 59). His mother and father were going to Providence, Rhode Island and from there they were going to fly to Sweden (T. 59). They had left Texas four days before Mrs. Holm died (T. 60). The witness' father, Mr. Holm, was about five feet ten and one-half inches tall and weighed about two hundred thirty-five pounds; physically, he was strong; he wore gold rimmed bifocals (T. 60, 61). Mr. Holm was born on December 24, 1892, and came to America in 1908 (T. 62). The witness' mother and father had lived on a farm they owned at Karnes City, Texas, about 60 miles southeast of San Antonio (T. 62).

BERNIE WEBB (T. 63-73) was the athletic director at Blountville, Tennessee, High School (T. 63). Early on the evening of June 11, 1954, he was driving toward the highway between Bristol and Blountville (T. 65). Later he left this highway and went on to a side road, where he saw the defendant Stubbs coming toward the highway (T. 65-66). The witness turned around, came back, and asked the defendant if he wanted a ride (T. 66). The defendant said he had come from Texas and was headed toward New York hitch-hiking (T. 66): ". . . he said that he had injured his head. There was some blood on his head and he said that he had injured his head that he had fell on some rocks . . . I mean that he fell and hit his head against a rock" (T. 66). The witness and the defendant went on the highway toward Bristol (T. 67). In about four miles they approached the roadblock (T. 67). There were several people at the roadblock, including a Sergeant Seahorn (T. 68): "I said, I believe that this is your man. And that is all that I said" (T. 68).

Tabular Summary of Testimony at Respondent's Second Tennessee Trial.

Bernie Webb; John O. Marcy; J. L. Seahorn.

On cross examination Mr. Webb testified that at no time did the defendant give him any trouble or try to get out of the automobile (T. 71).

JOHN O. MARCY (T. 73-77) was a medical doctor practicing in Bristol, Tennessee, Virginia (T. 73). He examined the defendant William Charles Stubbs at Bristol Memorial Hospital on the evening of June 11, 1954 (T. 74):

> "Q. Would you describe his condition? A. He was on the . . . he was brought into the emergency room by the highway patrol and he was placed on the table, the examining table. He had several lacerations on the right side of his head.
>
> Q. Would you describe those lacerations, please? As best you recall. A. There were three small cuts above and behind his right ear.
>
> Q. Could you tell what had made those cuts, what had produced them? Could you tell from your examination what had produced them? A. It could have been a blow on the head, I would say?
>
> Q. Were they smooth cuts or were they ragged? [*75] Q. Do you recall the size of them? A. They would vary from one, to two, to three inches in length.
>
> Q. Were they deep cuts or shallow cuts? A. They were rather deep. They went through the scalp" (74-75.)

The cuts on the defendant's head were fresh, having been inflicted two to six hours before the examination (T. 75).

J. L. SEAHORN (T. 77-84) was an officer with the highway patrol on June 11, 1954 (T. 77). He and trooper Montgomery were manning a roadblock at an intersection on the highway leading from Blountville to Bristol (T. 77). Mr. Stubbs was arrested and taken out of Mr. Webb's car as

Tabular Summary of Testimony at Respondent's Second Tennessee Trial.

J. L. Seahorn.

soon as it had driven up to the roadblock (T. 78). The defendant was wearing blue trousers and a khaki shirt; his trousers were torn in the left leg; he had a pretty long heavy beard and "was pretty rough looking" (T. 78). The witness observed that the defendant had blood on the front of his shirt (T. 78). After the defendant had been arrested and the officers started to Bristol with him, the defendant made a statement that he had been fishing down on Cherokee Lake, had fallen off a rock cliff, and had cut his head, which was where the blood had come from (T. 79). The defendant said that he was going to New York and had hitched a ride up (T. 79). The defendant was searched (T. 79). A pocket knife, one empty bullet shell and a billfold were found (T. 80). Mr. Seahorn later was among the officers who took the defendant to the hospital (T. 80): ". . . and one of the men asked Mr. Holmes [*sic*] if he could recognize anybody in that crowd, could recognize this man and Mr. Holmes pointed at him and said that is the man that killed my wife and shot me" (T. 80).

On cross examination Mr. Seahorn testified that when the Webb automobile reached the roadblock the defendant, who did not have any chance to get away, did not try to get away (T. 81-82). The defendant was immediately told he was under arrest for investigation of murder (T. 82). After the defendant Stubbs had reached the police department, he was accompanied by about five armed officers most of the time (T. 82-83). The defendant had cuts on his head which required treatment by a doctor (T. 83). When the defendant was taken up to Mr. Holm's room at the hospital, no individuals were up there with the defendant similar to him in size and appearance (T. 83).

Tabular Summary of Testimony at Respondent's Second Tennessee Trial.

H. P. Montgomery.

H. P. MONTGOMERY (T. 84-98) was a corporal in the highway patrol on June 11, 1954 (T. 85). He had joined the original search (T. 86). After some two hours he went to the city limits of Bristol on the highway and set up a roadblock (T. 86). The defendant, when he got out of the Webb automobile, had a two or three days' growth of beard; his clothes were dirty and had blood on them (T. 87). A search of the defendant Stubbs produced a billfold, a pocket knife, and one pistol shell (T. 87). The defendant said that he got the blood that was on him from a fall while fishing at Cherokee Lake (T. 88). Mr. Montgomery was one of the officers who took the defendant to the hospital (T. 88). The witness recalled that one of the senior officers asked Mr. Holm "if he had seen this fellow before", and Mr. Holm ". . . pointed his finger at him and said, yes, sir, he said that is the man that killed my wife and shot me" (T. 88-89).

At least five uniformed officers accompanied the defendant to the hospital (T. 93-94). There was plenty of light in the hospital room (T. 95). The witness did not think that Mr. Holm had his glasses on (T. 95). The question asked Mr. Holm was "if he had seen this fellow before" (T. 95). At the time of this identification Mr. Stubbs was hand-cuffed and standing among the officers (T. 95). The defendant asked why he was being arrested; the witness responded that he did not know why (T. 96). At the identification procedure in the hospital, Mr. Holm was not shown anyone else similar in appearance to Mr. Stubbs; Mr. Holm was only asked if he had seen Mr. Stubbs before (T. 97).

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Roy Edwards.

Roy Edwards (T. 98-109) was employed on June 11, 1954, by the Bristol, Tennessee Police Department as an investigator (T. 98). At about 2:30 in the afternoon a call was received at police headquarters that a woman had been shot on the Old Blountville Highway (T. 99). The shooting took place approximately four and one-half miles west of Bristol (T. 99). A 1951 Ford with Texas license plates was in a ditch (T. 100). A search commenced; the police were looking for an individual about twenty-three to twenty-four years old, small in build, approximately five feet six or seven inches in height, dressed in khaki clothes (T. 101). Mr. Edwards first saw the defendant at police headquarters at about 8:00 P. M. (T. 101): "He had a heavy growth of beard on him, and blood on his shirt and small wounds on his head. Lacerations over his right ear rather, and one on his forhead [*sic*]. There was a wound on his hand, his left hand between his hand and his left finger" (T. 102). The witness asked the defendant where he got the wounds, "and he said that he fell on Cherokee Lake fishing" (T. 102). When the defendant signed a fingerprint card, he used his left hand (T. 102). When he was taken to the hospital room of Mr. Holms, the defendant Stubbs was handcuffed to Mr. Edwards (T. 103):

> "As you go into the room, Mr. Holmes [*sic*] bed is on the right. Doctor Harkrader went in and explained to Mr. Holmes our mission there and we walked in to the foot of the bed and Doctor Harkrader turned the ceiling light on. There was a small light on over the bed and Mr. Holmes raised up on his right elbow and looked at him and said that is the man that shot my wife and shot me.

Tabular Summary of Testimony at Respondent's Second Tennessee Trial.

Roy Edwards; A. H. Hurd.

"Q. And who was he referring to? A. Mr. . . . the defendant" (T. 103).

Leaving the hospital room of Mr. Holm, the witness testified that the defendant Stubbs said that he had never laid eyes on the man (T. 104). Following this identification procedure in the room of Mr. Holm, the defendant Stubbs was taken to the emergency room where he was treated for his lacerations (T. 104). The witness received some items physical evidence, which were forwarded to the FBI laboratory in Washington (T. 105).

On cross examination Mr. Edwards testified that the .32 caliber Smith and Wesson gun, which the witness received from Captain Williamson, was loaded with empty shells (T. 106). No paraffin test was performed on Mr. Stubbs (T. 107). The witness, the two doctors, a constable and Chief Rogers were dressed in civilian clothing when the identification procedure was conducted at the hospital; the doctors had on suits, the constable was about fifty years old (T. 107-108). The witness did not recall whether Mr. Holm was wearing his glasses (T. 108).

A. H. Hurd (T. 109-113) was the Sheriff of Sullivan County, Tennessee on June 11, 1954. The entire force was out hunting for the suspect (T. 110). The witness saw the defendant first after he had been taken into custody (T. 110). The defendant Stubbs was asked by Sheriff Hurd about the injuries to his face and head, ". . . and as I remember he told me that he was fishing down on Cherokee Lake and fell and hurt himself" (T. 111).

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C. C. Wagner; Holm Subpoena; H. C. Smith.

CHARLES C. WAGNER (T. 113-118) was a member of the Sullivan County Sheriff's Department at the time of the 1964 trial and had the job of handling subpoenas (T. 113-114). In the absence of the jury, Mr. Wagner testified as to whether certain people were served with subpoenas on behalf of the prosecution (T. 116).

SUBPOENA FOR MR. ALEX HOLM. At this point in the trial (T. 118) the prosecuting attorney introduced into evidence a subpoena, "for Mr. Alex Holmes [*sic*] that was sent to the Sheriff of Karnes County, Texas in Karnes City. The return being made on this as Alex Holmes, on the 17th day of July, 1964 as being in Sweden" (T. 118-119).

HERMAN CONWAY SMITH (T. 120-132) was at the time of the 1954 trial the Tennessee District Attorney General (T. 120-121). Apparently in the absence of the jury (T. 121, lines 8-11), the witness gave recollections of his concerning Mr. Stubbs' testimony at the 1954 trial. The witness's recollection, as revealed on direct examination, was that Mr. Stubbs:

> ". . . stated that he first saw Mr. and Mrs. Holmes at a road side table in Hawkins County, Tennessee near Cherokee Lake. It seems that to the best of my recollection, Mr. and Mrs. Holmes were having lunch at the road side table only the two being present and that there was an automobile bearing a Texas license plate on it at the road side park. That he came up from the bank side which is nearer to the road side table about the time they were finishing their lunch and were fixing to get back in the car. He engaged with them in conversation, that he asked them where they were going aand they told him and he went around the automobile

Tabular Summary of Testimony at Respondent's Second Tennessee Trial.

Herman Conway Smith.

and as he came back to where they sat at the road side table putting things in the car. He had a 32 pistol with him at that time. That he told Mr. and Mrs. Holmes to get into the back seat of the car and that he would drive. And that for some distance driving toward Kingsport from or on 11-W, I believe was the highway and he held the pistol in his left hand and he steered the automobile with his right. They came through Kingsport. They proceeded through Blountville. A short distance from Blountville, some distance West of Bristol, that some statement was made by them in the car and that the shooting took place . . ." (T. 123-124).

On cross examination the witness testified that he recalled Mr. Stubbs testifying that he had approached the Holms car because he wanted a ride (T. 125). The witness thought that Mr. Stubbs had testified in 1954 that when he came into Tennessee he did not have any money (T. 126); that Mr. Stubbs had traveled many places and had been walking a considerable period of time (T. 127); that he had discussed transportation with the Holms (T. 127).

The witness Smith was asked by defense counsel at the 1964 trial about whether he could recall Mr. Stubbs having testified in 1954 about beginning to talk with Mr. and Mrs. Holm, who were in the back seat of their automobile as they were driving toward Bristol (T. 128); about Mr. Stubbs just wanting a ride because he was hungry and about him not intending to hurt the Holms (T. 129); about Mr. Holms asking Mr. Stubbs to put the gun down, about Mr. Stubbs starting to put it in his belt and about Mr. Holm saying "why don't you put it down here on the front seat," about Mr. Stubbs doing this before the automobile ever got into Sullivan County (T. 129):

Tabular Summary of Testimony at Respondent's Second Tennessee Trial.

H. C. Smith; C. Harkrader, Jr.; G. M. Blessing.

"Q. And you remember, don't you that Mr. Stubbs testified that after he was asked to put the gun down, he did and they became on friendly terms and friendly relationships before they ever came into trouble? A. Mr. Stubbs, testified, concerning a trip here, as to present language used, as to terms of friendly, there were objections and it was sustained by the court calling for a conclusion as to whether they were on friendly terms and that was a question for the jury . . .

"Q. Now, I am not asking you if it is a question for the jury. Now, you remember him testifying . . . A. Yes, sir, I remember him testifying" (T. 131).

FRANKLIN TALMADGE BUCHANAN (T. 133-138) was a physician practicing in Bristol, Tennessee, Virginia (T. 133). He had treated Mr. Holm on June 11, 1954, and thereafter for gunshot wounds of his face (T. 133). Mr. Holm had two wounds, one just below the left eye and another just lateral to that over his teeth (T. 133). One bullet had ended up in his neck and the other had ended up in his nasal passage (T. 133). One of the bullets had struck the bottom edge of one of the lenses in Mr. Holm's eye glasses (T. 134). The doctor was present at the time Mr. Holm identified Mr. Stubbs as his assailant (T. 135).

CHARLES HARKRADER, JR. (T. 138-141) was a doctor practicing in Bristol, Tennessee (T. 138). He had attended Mr. Holm who was suffering from two bullet wounds in his face which had been inflicted at rather short range (T. 134). The two bullets were removed, one from the nasal pharnyx and the other from the neck (T. 139).

GORDON M. BLESSING (T. 141-152), out of the presence of the jury, testified that as a Deputy Sheriff of Sullivan

Tabular Summary of Testimony at Respondent's Second Tennessee Trial.

Gordon M. Blessing; Counsels' Objections.

County, Tennessee, he had served subpoenas upon some of the witnesses, but had been unable to locate seven named witnesses and had returned that three individuals sought as witnesses by the prosecution were deceased (T. 143).

DEFENSE COUNSELS' OBJECTIONS TO READING TESTIMONY FROM FORMER TRIAL. When the prosecution first announced its intention to read to the jury the testimony from the first trial, the defendant objected. A colloquy and ruling ensued (T. 159-164). This portion of the transcript of the 1964 trial, which was omitted from the joint appendix, is reproduced below in its entirety:

[*159] "Mr. Wooten [Assistant Attorney General, prosecuting]: If Your Honor please, the State purports to offern into the record, the testimony of the deceased witnesses and witnesses that we have not been able to obtain service on from the original trial. We have present the Court Reporter who transcribed the original record and she is here to read the testimony into this record.

The Court: Now, General, I think that you had better say which witnesses are going to be read. I think that you have two of them that you have admitted that they have admitted were dead. Which one are you going to read first, General?

Mr. Wooten: I would like to read Mr. Axel Holmes [Alex Holm], if Your Honor please.

Mr. Haynes [Defense Counsel]: Your Honor, it is our position that the law in this state, prohibits the reading of prior testimony of another witness who is still alive.

The Court: Have you any authorities on this question of when a person is out of the jurisdiction of the United States?

Mr. Haynes: The cases that we have Your Honor, hold that when a person is out of the jurisdiction of

Tabular Summary of Testimony at Respondent's Second Tennessee Trial.

Counsels' Objections to Reading Former Testimony.

the United [*160] I mean the State and still alive, that person's testimony cannot be admissable [*sic*].

The Court: Now, does that say State or United States?

Mr. Haynes: It says state, but that would still be out of the jurisdiction of this Court. But it would be the same, we contend, whether they be out or whether they be in a foreign country or a foreign state. Hall vs. State in 65 Tennessee Reports 522 and it has not been overruled or modified to the extent, it held that a person's testimony could not be read as long as that witness was still alive and frankly, this case would modify an earlier case that held that a witnesses testimony couldn't even be read and him dead. This is Hall vs. State. It held that as along as a witness was still alive that it could not be read and we contend that it be true whether they be in another state or country. It wouldn't make very much difference. In this case, it has not been shown that there has been any effort to have Mr. Holmes to come here by anybody. There has been an offer on their part to have us take the deposition so that we could be afforded the right to cross examination. There is no effort apparently [*sic*], on or about the 13th of July, they got a subpoena issued and sent down to Texas and that subpoena was directed to the sheriff of Sullivan County who had no legal force down there in Texas at all. And an unsigned return was [*161] made on that subpoena and sent back. We rely strongly on Hall against the State. It has not been changed, nor has it been modified.

The Court: I don't think that there is anything anything in the code about it gentlemen, if I remember correctly. Or I don't ever remember ever seeing anything. It is . . .

Mr. Haynes: It is a real old case, if Your Honor please. I have Sheapardized [*sic*] this case and it has not been overruled or modified.

The Court: Well, go ahead. I will hear you and then I want to hear the State.

Tabular Summary of Testimony at Respondent's Second Tennessee Trial.

Counsels' Objections to Reading Former Testimony.

Mr. Haynes: There is one further element in this case that Your Honor should consider and that is, whatever prior testimony that they may offer, the only cross examination that we have here, would be the cross examination that was made ten years ago by attorneys that had only a few days to prepare the defense . . . or one day to prepare their defense. And the Federal Court has already held in the order that Your Honor has seen and they said that the lawyers didn't have sufficient time to prepare their defense and surely, they didn't have time to prepare an adequate cross examination. Now, certainly we can't cross examine them. We can't cross examine a transcript. That is the one thing that they sent this case back to improve. Now, that states our [*162]

The Court: Alright, Mr. Attorney General, what do you have to say?

Mr. Wooten: Your Honor, the Hall vs. State is in 1872 is modified by implication by Section 40-2429 of the Tennessee Code which provides for uniform attendance of the witnesses. At the top of the page in Hall vs. State was yielding . . . was yielded by this statute which now provides the attendance of witnesses anyplace in the jurisdiction or in the District of Columbia. Under this authority, we have no way to compel the attendance of Mr. Holmes. He is beyond the issuing of the judicial processes, not only in the State of Tennessee, but in the United States of America. And for all legal purposes, he is dead. Or at least, he he is dead as far as the State of Tennessee is concerned. Our position is, that his testimony would be admissable [*sic*]. Our further contention is that his testimony would be essential to the prosecution of this case. Now, we have the Court Reporter here that took the testimony and it is available to us only in that manner. We do not think that Hall vs. State is authority at this time.

Mr. Mitchell [Defense Counsel]: Your Honor please, I think it is the law and it is the law until the

Tabular Summary of Testimony at Respondent's Second Tennessee Trial.

Counsels' Objections to Reading Former Testimony.

courts speak otherwise. Now, as your Honor recalls, Mr. Wooten stated that he would have Mr. Holmes present . . . [*163]

The Court: Well, we will not argue that point. I want to hear the law, gentlemen. That is what I want. I want to know the law.

Mr. Mitchell: Now, I do want to insist upon this, if Your Honor please could have taken this man's deposition if they wanted to. Now, this man is on trial for his life. I think that they ought to show that they made a reasonable attempt to have him summonends. And I was reading from the newspaper which is not admissable [*sic*], but one of the reporters asked Mr. Holmes if . . .

The Court: Well, let's don't get into the newspaper.

Mr. Mitchell: Well, one of . . .

The Court: I have heard too much already . . .

Mr. Mitchell: I understand, but Mr. Holmes testified about where his father was, yet he was quoted as saying that his father didn't even know that it was being tried. And if that be the case, then I think the State has fallen down on their duty.

The Court: Gentlemen, I think this, I believe that where there is a process whereby they can get witnesses in the United States and there is not a process whereby we can bring those witnesses back from a foeign country, I think that it does make a difference. And I feel like the evidence of the sons of the prosecutor . . . he swore that he was in Sweden and I am going to overrule this and I am going to [*164] let it in. Let the jury come back. Do you want to take that up about the qualifications of the witness and let them hear that.

Mr. Wooten: I believe that it would be competent Your Honor.

The Court: Yeah, let the jury come back" (T. 159-164).

Tabular Summary of Testimony at Respondent's Second Tennessee Trial.

Elena B. Harris; Williams Charles Stubbs.

ELENA B. HARRIS (T. 164-233) (T. 283-287) was the court reporter who had attended the 1954 trial of William C. Stubbs (T. 165). She had retained her shorthand notes of the former trial (T. 166) and had prepared a transcript of it (T. 167). Again, counsel for the defendant objected to the reading of the testimony from the earlier trial:

> "And we further object on the grounds that this is hearsay. There has been no showing on, no showing of any effort on the part of the State to get this witness here and said defendant will be deprived of the right of cross examination as provided in the Constitution and will be deprived of due process" (T. 173).

The objection was overruled, the transcript was admitted into evidence as an exhibit (T. 174). The remainder of Mrs. Harris' testimony consists in the reading of Mr. Holm's testimony from the 1954 trial with interjections made by the trial judge and counsel at the 1964 trial. This testimony is reproduced in the joint appendix (A. 36-74; 103-105), is discussed in the argument, and thus, need not be summarized here.

WILLIAM CHARLES STUBBS (T. 237-283) the defendant, testified on his own behalf. Since his testimony is fully reproduced in the joint appendix (A. 75-102) it, also, need not be summarized here.

DONALD STUBBS (T. 281-283), the defendant's brother, was called as a witness for the defense, but testified to nothing material.

Tabular Summary of Testimony at Respondent's Second Tennessee Trial.

Charge of Trial Judge.

CHARGE OF THE TRIAL JUDGE. The instructions to the jury by the trial judge at the 1964 trial contain the following provisions relating to the defense offered:

> "The theory of the defendant in this case is that he did not shoot and kill Mrs. Ruth Holm as charged in the indictment; that when he came to the roadside table where the deceased and her husband, Alex Holm, were eating, he was tired, hungry and broke and wanted a ride to Bristol with them in their car; that when they refused, he took his pistol in his hand and made them get into the car. That he did not intende to rob or shoot them and intended to get out at Bristol and let them go on with their car and other property. That when they went through Rogersville, at the request of Mrs. Holm, he laid the pistol down in the front seat. That when he got to the scene of the shooting, he looked at some people standing on the side of the road and thereupon something struck him on the head and he threw up his hand and heard a loud report; that thereafter, he was dazed, but managed to fall out of the car; that he did not shoot the pistol at either of them and knows nothing about who shot Mrs. Holm, but that he ran away because he knew that Mr. Holm had the pistol and would shoot him;
>
> If you believe the theory of the defendant, or have a reasonable doubt of his guilt, you should acquit him" (T. 298).

APPENDIX B.

ORDER

STUBBS v. BOMAR, reproduced in this appendix, is the order of the United States District Court for the Middle District of Tennessee, which declared null and void the 1954 conviction of William C. Stubbs. This order was introduced at the 1964 Tennessee Trial (T. 153).

IN THE

UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF TENNESSEE,
NASHVILLE DIVISION

WILLIAM C. STUBBS,

Petitioner,

v.

LYNN BOMAR, Warden, Tennessee State Penitentiary,

Respondent.

Civil Action 3585.

ORDER

This cause came on to be heard on this the 19th day of December, 1963, before the Honorable William E. Miller, Judge, United States District Court, upon the petition for writ of *habeas corpus* filed by petitioner, William C. Stubbs, answer thereto filed on behalf of respondent, Lynn Bomar,

Warden, Tennessee State Penitentiary, the petitioner being present in Court and represented by counsel, and after a full and complete hearing of the matter, including the testimony of the petitioner and upon consideration of the entire record, the Court is of the opinion that the petition for writ of *habeas corpus* filed in this cause should be granted.

It appears from the record that petitioner Stubbs was arrested in Sullivan County, Tennessee, on the 11th day of June, 1954, for the crimes of murder in the first degree, assault with intent to commit murder and kidnapping (two cases), the alleged offenses having occurred on the same date in Sullivan County, Tennessee.

The evidence and the record further reveals that the petitioner was indicted in the Criminal Court of Sullivan County for the above enumerated offenses on the 8th day of July, 1954, and on the next day, to wit, the 9th day of July, 1954, the petitioner was arraigned before the Trial Judge and at which time three members of the Sullivan County Bar were appointed to represent petitioner Stubbs.

The evidence and the record before the Court shows that petitioner's case was set for trial on the 12th day of July, 1954, at which time Court-appointed counsel representing the petitioner filed a motion for a continuance on the ground that the Court-appointed counsel had not had sufficient time to prepare a defense on behalf of petitioner, and the Court-appointed counsel also filed a motion for a change of venue. Both motions were overruled by the Trial Judge, and the petitioner was put to trial on the 12th day of July, 1954.

The evidence and the record before the Court shows that the State of Tennessee was seeking the death penalty against the petitioner, and the petitioner being an indigent person, the Trial Court appointed a Court reporter, as authorized under the provisions of Section 40-2011 Tennessee Code Annotated. However, the evidence and the record further shows that the Trial proceedings were never transcribed or reduced to writing by the Court reporter. There is likewise some evidence before the Court that the petitioner requested his Court-appointed counsel to appeal his convictions, and his Court-appointed counsel failed to or refused to appeal said convictions on account of the petitioner being an indigent person.

The Court is of the opinion that the evidence and the record show that the Constitutional rights of petitioner Stubbs were violated at the time of his trial in the Criminal Court of Sullivan County in that his Court-appointed counsel did not have adequate and sufficient time within which to prepare the necessary defense prior to going to trial, and as a result the petitioner was denied effective representation by counsel. The Court is of the further opinion that the petitioner's Constitutional rights were violated when the petitioner was denied the right to have said convictions and judgments appealed to the Supreme Court of Tennessee on account of the petitioner being an indigent person.

It is therefore ordered, adjudged and decreed by the Court that the convictions and judgments rendered against petitioner Stubbs in the Criminal Court of Sullivan County in July of 1954 be and the same are hereby declared null and void, and said petitioner will be released and dis-

charged from the custody of the respondent as Warden of the Tennessee State Penitentiary.

It is further ordered, adjudged and decreed by the Court that the petitioner, William C. Stubbs, is hereby remanded to the further custody of the Sheriff of Sullivan County for further prosecution by the State of Tennessee, if the State of Tennessee so desires.

The Clerk of the Court is hereby directed to furnish a certified copy of this order to the respondent, Lynn Bomar, as Warden of the Tennessee State Penitentiary, which will be authority for the respondent to release the said petitioner from his custody, and deliver the petitioner to the custody of the Sheriff of Sullivan County. The Clerk of the Court is likewise directed to furnish a certified copy of this order to the Sheriff of Sullivan County which will be the authority for the Sheriff of Sullivan County to receive and take custody of petitioner Stubbs, pending further prosecution by the State of Tennessee.

WILLIAM E. MILLER,
Judge.

Approved for entry:
JAMES L. ROBERTS,
Attorney for Petitioner Stubbs.

HENRY C. FOUTCH,
Assistant Attorney General,
State of Tennessee.

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

MANCUSI, WARDEN *v.* STUBBS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 71–237. Argued April 17, 1972—Decided June 26, 1972

New York State sentenced respondent as a second offender, based on his 1964 felony conviction in Tennessee. Respondent's petition for federal habeas corpus, denied by the District Court, was granted by the Court of Appeals which concluded that the Tennessee conviction violated his Sixth and Fourteenth Amendment right to confront witnesses and thus was not available as the predicate for a "second offender" stiffer punishment. The State then resentenced respondent to the same sentence, based upon still another conviction in Texas. *Held:*

1. New York State's resentencing of respondent did not moot the instant case since the respondent's appeal from the Texas conviction is still in the state courts and therefore New York State has a present interest in the availability of the Tennessee conviction as a predicate for the stiffer punishment. Pp. 1–3.

2. Upon discovering that a State's witness had removed himself permanently to a foreign country, the State of Tennessee was powerless to compel his attendance at respondent's second trial, either through its own process or through established procedures depending upon the voluntary assistance of another government; the resultant predicate of unavailability was sufficiently strong not to warrant a federal habeas corpus court's upsetting the State's determination that the witness was not available. *Barber* v. *Page*, 390 U. S. 719, distinguished. Pp. 3–7.

3. Where a State's witness is bona fide unavailable, the requirements of the Confrontation Clause are met when prior-recorded testimony of the witness is admitted, as occurred in the 1964 trial, if that prior testimony bears "indicia of reliability" that would afford "the trier of fact a satisfactory basis for evaluating the truth of the prior statement." *Dutton* v. *Evans*, 400 U. S. 74, 89. Pp. 8–11.

442 F. 2d 561, reversed.

Syllabus

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, BLACKMUN, and POWELL, JJ., joined. MARSHALL, J., filed a dissenting opinion, in Part II of which DOUGLAS, J., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 71–237

Vincent R. Mancusi, Warden, Petitioner, *v.* William C. Stubbs. | On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[June 26, 1972]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Respondent Stubbs was convicted of a felony in a New York State court and sentenced as a second offender under the laws of that State by reason of a prior Tennessee murder conviction obtained in 1964. He thereafter sought federal habeas corpus, claiming that the Tennessee conviction was had in violation of his Sixth and Fourteenth Amendment right to confront witnesses against him, and thus could not be used by New York as the predicate for a stiffer punishment. The District Court denied habeas corpus, but the Court of Appeals reversed, 442 F. 2d 561 (CA2 1971). We granted certiorari, 404 U. S. 1014, and reverse for the reasons hereinafter stated.

I

Prior to our consideration of the merits it is necessary to deal with a suggestion that because the State did not seek a stay of the mandate of the Court of Appeals, but rather obeyed it, and resentenced Stubbs, this case is therefore moot. The parties agreed at oral argument that Stubbs upon resentencing in New York had received the same sentence, based upon still another conviction in Texas. However, he was appealing from that sentence on grounds that the Texas conviction was constitutionally

infirm, and that appeal has not run its course even through the state courts.

Until it can be said with certainty that New York may validly resentence respondent to the same term as it imposed prior to the decision of the Court of Appeals now under review here, New York continues to have an interest in the availability of the Tennessee conviction as a support for second offender sentencing of respondent. The State's obedience to the mandate of the Court of Appeals and the judgment of the District Court does not moot this case.[1] In *Bakery Drivers Union* v. *Wagshal*, 333 U. S. 437 (1948), the union appealed from an injunction issued by the United States District Court on the ground that it had been issued in violation of the provisions of the Norris-LaGuardia Act. Dealing with a

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[1] The dissent states that this case is controlled by *SEC* v. *Medical Committee*, — U. S. —. In that case respondent committee had requested Dow Chemical to place the committee's proposed resolution on the proxy statement for the annual meeting of Dow Chemical stockholders. Dow Chemical initially refused the request, and the committee thereupon invoked the aid of the SEC to bring suit against Dow Chemical to compel inclusion of the proposal. The SEC refused to bring suit, and the committee then succeeded in having the agency's refusal set aside by the Court of Appeals. While review of this latter action was pending here, Dow Chemical acceded to the committee's request. The committee thereby accomplished the purpose for which it sought ancillary assistance from the SEC, not because of compliance by the SEC with the judgment under review, but because of the action of Dow Chemical which was not required to do anything by that judgment.

There would be a rough parallel between our case and *SEC* v. *Medical Committee* if, pending review here of the ruling of the Court of Appeals in favor of Stubbs, the Governor of New York should pardon Stubbs. But on the facts we have before us now, the mootness issue is controlled by *Bakery Drivers* and *Dakota County, infra*, rather than by *SEC* v. *Medical Committee*.

"preliminary claim" of mootness in that case, the Court said:

> "The claim of mootness is also based on an affidavit stating that after dismissal of the appeal by the Court of Appeals, the union lifted its boycott. Since the record does not show that a stay of the injunction was granted pending action in this Court, we must assume that the union's action was merely obedience to the judgment now here for review. We therefore turn to the merits." 333 U. S., at 442.

Much earlier the Court had stated a similar view of mootness in these circumstances:

> "There can be no question that a debtor against whom a judgment for money is recovered may pay that judgment and bring a writ of error to reverse it, and if reversed can recover back his money. And a defendant in an action of ejectment may bring a writ of error, and failing to give a supersedeas bond, may submit to the judgment by giving possession of the land, which he can recover if he reverses the judgment by means of a writ of restitution. In both these cases the defendant has merely submitted to perform the judgment of the court, and has not thereby lost his right to seek a reversal of that judgment by writ of error or appeal." *Dakota County* v. *Glidden*, 113 U. S. 222, 224 (1885).

Under these authorities the case is not moot, and we turn to the merits.

II

In July 1954, respondent was convicted in the Tennessee trial court of murder in the first degree, assault with intent to murder, and two counts of kidnapping. The jury empaneled for that trial could have concluded from the evidence presented to it that respondent, a few

days after his release from a Texas penitentiary in June 1954, kidnapped Mr. and Mrs. Alex Holm and forced them at gun point to accompany him in their car. Stubbs drove the car and sat in the front seat, while the Holms sat in the back seat. Mr. Holm testified that somewhere east of Blountville, Tennessee, Stubbs, without saying anything, shot him twice in the head and shot and killed Mrs. Holm. Stubbs then left the car, obtained a ride as a hitchhiker, and was ultimately arrested at a roadblock. At the time of his arrest, Stubbs explained the blood on his clothing as having resulted from his having fallen off a cliff while fishing.

Stubbs took the stand in his own defense, admitted that he had kidnapped the Holms at gun point, and that as he drove the Holms' car with them in the back seat he at intervals pointed the gun in Mrs. Holm's face. He testified that during the ride he apologized for forcing a ride; that the Holms then assured him they would let him out at Bristol, Tennessee, and would not cause him any trouble, and that he therefore laid the pistol on the front seat of the car. He also testified that near Bristol, Tennessee:

> "It seems awful strange, but everything just seemed to be awful still and I remember a tree and it just seemed to come up just like that in a clear focus but in a reddish haze. I mean there was no pain or nothing, . . . I felt a sharp pain that seemed to start in my head and go all the way down through me and I reached up with both hands and heard this loud roar, bang . . . Stuff started down my face and down my shirt and all that I could think of is that he has got the gun . . . I just went outside through the car door . . ."

After that, Stubbs testified, "everything went black."

Nine years after his state court trial for murder, Stubbs sought release on federal habeas corpus from the United States District Court for the Middle District of Tennessee.

He successfully urged upon that court the contention that he had been denied the effective assistance of counsel in this 1954 trial because counsel had been appointed for him only four days before the trial took place. *Stubbs* v. *Bomar*, Civil Action No. 3585 (MD Tenn. 1964). The State of Tennessee then elected to retry him, and did so in 1964. At that time Holm, who had been born in Sweden but had become a naturalized American citizen, had returned to Sweden and taken up permanent residence there. Tennessee issued a subpoena that was sent to Texas authorities in an attempt to serve Holm at at his last known United States address. No service having been obtained, the State at trial called Holm's son as a witness and elicited from him the fact that his father now resided in Sweden. Over appropriate objection on constitutional grounds, the Tennessee trial judge then permitted Holm's testimony at the earlier trial to be read to the jury. Stubbs again took the stand, recited his version of the events, and was again convicted. This conviction was in due course affirmed by the Supreme Court of Tennessee. *Stubbs* v. *State*, 216 Tenn. 567, 393 S. W. 2d 150 (1965).

Respondent has challenged the present second offender sentence that was imposed upon him by the New York courts on the ground that his 1964 conviction upon retrial was constitutionally infirm because he was denied his Sixth and Fourteenth Amendment right to confront the witness Holm. The Court of Appeals sustained this contention, relying on this Court's opinion in *Barber* v. *Page*, 390 U. S. 719 (1968).

In *Barber*, a prospective witness for the prosecution